United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

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74-2319 B

Pgs 5

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA

–against–

FRANK BREENE and JOHN INDIVIGLIO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

REPLY BRIEF FOR APPELLANT INDIVIGLIO

JOSEPH WINSTON
Attorney for Defendant-Appellant
John Indiviglio
101 Park Avenue
New York, N.Y. 10017
MU 6-6780

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2319

UNITED STATES OF AMERICA,

Appellee,

-against-

FRANK BREENE and JOHN INDIVIGLIO,

Defendants-Appellants.

This brief is submitted in behalf of John Indiviglio in answer to the Government's brief, final copies of which were received by the defendant's attorney through the mail on Friday, January 24, 1975.

ANSWERING POINT V OF THE GOVERNMENT'S BRIEF

The Government agrees that it must establish Indiviglio's participation in the conspiracy "by a fair preponderance of the non hearsay evidence". The Government then states that:

> "In light of Mr. Indiviglio's statement during the conspiracy which established that he was the importer of the narcotics, the Government submits that appellant Indiviglio's claim is without foundation."

Where in the record is there any statement by Indiviglio that he is an importer of narcotics? Since he never took the stand, obviously, he could not have made such a statement. It is assumed that the Government is relying upon some statement of a co-conspirator.

But the Government must prove these statements, either by Mr. Indiviglio himself or by a third party not a co-conspirator of his participation or by circumstantial evidence compelling such a conclusion. No such evidence exists in the record.

With regard to Indiviglio, the Government practically concedes that it has no direct evidence linking Indiviglio to any so-called conspiracy. However, the Government says it may introduce circumstantial evidence which is independent evidence for the purpose of convicting Indiviglio. The defendant does not quarrel with the proposition that circumstantial evidence, if indeed of such a nature and variety as to compel the conclusion that the defendant was part of the conspiracy, may be independent evidence. However, it is respectfully pointed out that there is no so compelling evidence in this record as was apparent in the case of United States v. Rizzuto, 504 F.2d 419 (2d Cir.1974). Or in the case

of United States v. Sisca, 503 F.2d 1337 (2d Cir. 1974).

These are the so-called non hearsay statements provided by the Government (pp.23-25 of Government's brief):

1. In 1968 Matteo (co-conspirator) had a talk with Somas. This is clearly a hearsay statement by a co-conspirator (p.23 of Government's brief).

2. Then we have another alleged conversation with Somas which the Government admits at the most is an abortive deal. This is no independent evidence.

3. Then the Government says that the trip abroad by Indiviglio was financed by Matteo. This too is based on hearsay and in fact contradicts the Government's allegation that Indiviglio had made millions.

4. The Government says Matteo, at one time, lived in an apartment house owned by Indiviglio. Surely, this is getting somewhat silly on non-hearsay evidence.

5. That Matteo, a co-conspirator, says that he picked up samples. Once again, hearsay.

6. That it is alleged that Indiviglio gave Matteo money to help him with the pending Court case. Surely, this could not be construed as evidence of anything.

7. Finally, laboratory equipment was found in Indiviglio's home. In fact, no narcotics or trace of them were

ever found on this so-called laboratory equipment. Despite the most intensive testing by the Government, despite surveillance and wire tapping, this should be conclusive evidence that indeed there was no illegal transaction here.

8. Then we have again another alleged conversation that a convicted felon stated that Indiviglio said he made millions. Now, assuming the truth of this boast, surely, boasting that a man makes millions to a convicted felon is hardly proof of participating in a conspiracy prior to May, 1971 and after May, 1971.

9. Finally, another conversation by convicted felon Somas on an alleged conversation that took place about heroin and drugs. But the conversation provides no tie in between Indiviglio and the conspirators in the charged conspiracy.

The Government, with thoroughly inconclusive hearsay evidence, then says that Matteo was shot five times in the back while carrying $350,000 in cash and a loaded revolver, all in Indiviglio's home. But, no one says that the money belongs to Indiviglio, no one says that any gun belongs to Indiviglio, no one says that Indiviglio had anything to do with the shooting or the money. The Government asks the jury and the Court to infer that Matteo traveled to Indiviglio's home with the money and a gun to purchase heroin. Certainly, there is not one scintilla of testimony along these lines.

Finally, the Government says that negotiations between Matteo and Aguiar during the week preceding September 27, 1972 may be considered non hearsay evidence constituting verbal acts shedding light on Matteo's conduct which then became constitutional proof of Indiviglio's involvement. Isn't this the most far-fetched statement in the entire Government's brief to prove independent evidence of Indiviglio's involvement in the conspiracy?

ANSWERING POINT VI OF THE GOVERNMENT'S BRIEF. IT WAS ERROR TO PERMIT A RE-READING OF THE PROSECUTOR'S SUMMATION

It is obvious that neither the defendant's summation nor the Prosecutor's summation are evidence but merely an explanation by each of them commenting on the evidence before the jury. The law permits this, and rightly so. But due emphasis should not be given either to the Prosecutor's summation or the defendant's summation. In this case, over objection, the jury was permitted to hear a portion of the Prosecutor's summation twice. But the Government says that after all, in a procedure contained in the proposed Rules of Criminal Procedure, the Prosecutor does really have two cracks at the jury and, therefore, having two cracks in the instant case is not at all error. First of all, we are dealing with the present Rules of

Criminal Procedure, not proposed rules of criminal procedure which are not yet in force and effect. Secondly, we are not presented with two different responses by the Prosecutor but a re-reading of the same Prosecutor's explanation. Since all parties agree this is not evidence, why should the jury hear it twice rather than once? The cases cited by the defendant, Powell v. United States, 347 F.2d 156 (9th Cir. 1965) and People v. Miller, 6 N.Y.2d 152 (1959), it is submitted, are in point. The Government argues that they are distinguishable because those decisions deal with a confusing charge by the jury. A reading of those cases fails to bear this out.

CONCLUSION

THE CONVICTION AGAINST INDIVIGLIO SHOULD BE REVERSED

Respectfully submitted,

JOSEPH WINSTON
Attorney for Defendant-Appellant
JOHN INDIVIGLIO
Office & P.O. Address
101 Park Avenue
New York, New York 10017
(212) MU 6-6780

C 147– Affidavit of Service of Summons and Complaint on Individual Not in Military Service

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. Docket No. 74-2319

UNITED STATES OF AMERICA,

Plaintiff-Appellee

against

THOMAS MATTEO, FRANK BREEN and JOHN INDIVIGLIO,

Appellants. *Defendant*

Affidavit of Service of Summons and Complaint

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

DAVID A. WINSTON *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

16 Quentin Road, Scarsdale, New York

That on the 27th *day of* January *19* 75 *at* U.S. District Ct., Eastern District of New York, 225 Cadman Plaza East, Bklyn.,N.Y.

deponent served the annexed Two copies of Reply Brief

on David G. Trager, U.S. Attorney, Eastern District of N.Y., atty. for plaintiff

herein, by delivering a true copy thereof to his office *personally. Deponent knew the person so served to be the person mentioned and described in said papers as defendant therein.*

I asked him whether he was in active military service of the United States or of the State of New York in any capacity whatever. He told me he was not. He wore ordinary civilian clothes and no miltary uniform. Upon information and belief I aver that the defendant is not in the military service of New York State or of the United States as that term is defined in either the State or in the Federal Soldier's and Sailor's Civil Relief Acts. The source of my information and the grounds of my belief are the conversations and observations above narrated.

Sworn to before me, this 27th *day of* January *19* 75

Joseph Winston

JOSEPH WINSTON
Notary Public, State of New York
No. 41-9707900
Qualified in Queens County
Term Expires March 30, 1976

David A. Winston

Print name beneath signature

DAVID A. WINSTON

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OF SUMMONS AND COMPLAINT

Attorney(s) for Plaintiff